UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CARTOON NETWORK LP, LLLP and CABLE NEWS NETWORK LP, LLLP, Plaintiffs/Counterclaim Defendants, v. CSV HOLDINGS, INC. and CABLEVISION SYSTEMS CORPORATION, Defendants/Counterclaim Plaintiffs/ Third-Party Plaintiffs, v. TURNER BROADCASTING SYSTEM, INC., CABLE NEWS NETWORK LP, LLP, TURNER NETWORK SALES, INC., TURNER CLASSIC MOVIES, L.P., LLLP, TURNER NETWORK TELEVISION LP, LLLP, and THE CARTOON NETWORK LP, LLP, Third-Party Defendants.	:	06 Civ. 4092 (DC)

TURNER'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Katherine B. Forrest
Antony L. Ryan
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Plaintiffs/Counterclaim Defendants The Cartoon Network LP, LLLP and Cable News Network LP, LLLP and Third-Party Defendants Turner Broadcasting System, Inc., Turner Network Sales, Inc., Turner Classic Movies LP, LLLP and Turner Network Television LP, LLLP

October 6, 2006

PUBLICLY FILED VERSION

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT 1

I. Cablevision Is Engaged in Unauthorized Reproduction 1

A. Cablevision Makes Unauthorized Storage Copies That It Maintains Indefinitely 1

B. Cablevision's Buffer Copies Are Unauthorized Reproductions 5

II. Cablevision Is Engaged in Unauthorized Transmission 7

A. Cablevision Makes the Infringing Transmissions 7

B. Cablevision's Transmissions Are Made "To the Public" 8

III. Cablevision's Unauthorized Distribution 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Basic Books Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991) 4

City of Los Angeles v. Preferred Commc'ns, Inc., 476 U.S. 488 (1986) 2

Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984) 9

Elektra Records Co. v. Gem Elec. Distribs., Inc., 360 F. Supp. 821 (E.D.N.Y. 1973) 4

FCC v. Midwest Video Corp., 440 U.S. 689 (1979) 2

Knickerbocker Toy Co. v. Azark-Hamway Int'l, Inc., 668 F.2d 699 (2d Cir. 1982) 7

Leathers v. Medlock, 499 U.S. 439 (1991) 2

Marks v. Leo Feist, Inc., 290 F. 959 (2d Cir. 1923) 7

Marobie-FL, Inc. v. Nat'l Assoc. of Fire Equip. Distribs., 983 F. Supp. 1167 (N.D. Ill. 1997) 6

Nat'l Football League v. Primetime Joint Venture, 211 F.3d 10 (2d Cir. 2000) 8

On Command Video Corp. v. Columbia Pictures Indus., 777 F. Supp. 787 (N.D. Cal. 1991) 9

Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381 (6th Cir. 1996) 4

Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., 907 F. Supp. 1361 (N.D. Cal. 1995) 4

Sandoval v. New Line Cinema Corp., 147 F.3d 215 (2d Cir. 1988) 7

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) 2

Triad Sys. Corp. v. Se. Express Co., 64 F.3d 1330 (9th Cir. 1995) 6, 7

Triad Sys. Corp. v. Se. Express Co., No. C 92 1539, 1994 WL 446049 (N.D. Cal. Mar. 18, 1994), *aff'd in relevant part*, 64 F.3d 1330 (9th Cir. 1995) 6

Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 192 F. Supp. 2d 321 (D.N.J. 2002), *aff'd*, 342 F.3d 191 (3d Cir. 2003), *cert. denied*, 540 U.S. 1178 (2004) 9

Warner Bros. Inc. v. Am. Broad. Cos., 720 F.2d 231 (2d Cir. 1983) 7

Statutes

17 U.S.C. § 101 .... 5, 6, 9

Other Authorities

Cablevision, New York Yankees Deal Collapses, Wall St. J., Mar. 31, 2003 2

U.S. Copyright Office, *DMCA Section 104 Report* (Aug. 2001) 6, 7

Turner submits this reply memorandum in further support of its motion for summary judgment.[1]

PRELIMINARY STATEMENT

Cablevision's opposition papers get the issue in this case right: "Put simply, the relevant question is not who is 'requesting' that copies be made; the question is who is *doing* the copying." (CV Opp. at 10.) But, having correctly identified the issue, Cablevision never attempts to answer the question. Rather, it assumes the answer is "the subscriber" and ignores or fails to analyze critical undisputed facts, which demonstrate that the RS-DVR Service is a commercial copying and transmission service in which Cablevision does the copying and transmitting. No prior case law and no legislative enactment has ever gone as far as Cablevision asks this Court to go to immunize a technologically sophisticated infringer from the direct results of its conduct. The point here is a simple one: unauthorized copies and transmissions of Plaintiffs' programming are made by the RS-DVR Service that Cablevision itself has designed, and that Cablevision itself will maintain, operate and promote. No legal doctrine or linguistic gymnastics can protect such blatantly infringing conduct.

ARGUMENT

I. CABLEVISION IS ENGAGED IN UNAUTHORIZED REPRODUCTION

A. Cablevision Makes Unauthorized Storage Copies That It Maintains Indefinitely

Cablevision tries to obscure its active role in making reproductions in the RS-DVR Service by isolating each of its actions and arguing that no single action would be sufficient to

[1] Capitalized and abbreviated terms are defined in Turner's Memorandum of Law in Support of Its Motion for Summary Judgment ("Turner Memorandum" or "Turner Mem.") and Turner's Memorandum in Opposition to Cablevision's Motion for Summary Judgment ("Turner Opposition" or "Turner Opp."). See page 3 and footnote 2 of the Turner Memorandum for the respective roles of Plaintiffs and the Turner entities brought in as Third-Party Defendants. References to Cablevision's Memorandum of Law in Opposition to Plaintiffs' Motions for Summary Judgment are to "Cablevision Opposition" or "CV Opp.". References to Turner's Statement of Facts Pursuant to Local Rule 56.1(a) in Further Support of Its Motion for Summary Judgment, submitted on October 6, 2006, are to "FSoF".

constitute copyright infringement. Thus, Cablevision contends that "merely provid[ing] consumers with machinery"[2] (CV Opp. at 6), "designing or servicing a copy system" (*id.* at 13), "play[ing] a role in determining the universe of programming available . . . for recording" (*id.* at 15), "pass[ing] along a large universe of potential works for . . . copying" (*id.* at 17) and "provid[ing] . . . a machine or system that indiscriminately transmits whatever programs the customer has elected to record and play back" (*id.* at 18) is each insufficient grounds for finding infringement. Cablevision refuses to address Plaintiffs' argument that Cablevision's systematic and pervasive involvement in the RS-DVR Service must be considered as a whole. Instead, according to Cablevision, a single action by the subscriber — pressing the "record" button — provides definitive evidence that Cablevision is not doing the copying.

Cablevision goes so far as to deny that it "'supplies' or 'selects' the copyrighted works that are made available over its cable system". (CV Opp. at 16.) This claim defies reality. As the Supreme Court has repeatedly held, "cable operators exercise 'a significant amount of editorial discretion regarding what their programming will include'". *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986) (*quoting FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979)); *see also Leathers v. Medlock*, 499 U.S. 439, 457 (1991). For example, in a well-publicized recent instance, Cablevision refused to carry YES, the New York Yankees' network, for a substantial period of time, even though other cable operators had elected promptly to carry the network. *See Cablevision, New York Yankees Deal Collapses*, Wall St. J., Mar. 31, 2003.[3] There is no genuine dispute that Cablevision selects the networks that it carries and makes available

[2] Of course Cablevision actually does *not* provide RS-DVR Service subscribers with *machinery* at all. The machinery in question resides at Cablevision's facilities. At most, Cablevision purports only to provide the customer with a type of "virtual" access to Cablevision's machinery (CV Opp. at 12) — a significant distinction between this case and *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 437, 438 (1984). (*See* Turner Opp. at 9.)

[3] Although a small number of broadcast stations are subject to federal "must-carry" requirements (CV Opp. at 16 n.8), those stations constitute a mere fraction of Cablevision's programming.

for copying, that it knows the network programming is copyrighted, and that it nonetheless has made an affirmative decision to launch a service that makes unlicensed copies and transmissions.[4]

Cablevision also tries to deny its essential role in making the business rules for reproductions and transmissions in the RS-DVR Service, but Cablevision's own documents reveal Cablevision's careful internal deliberations over:

- which programming to include in the Service (SoF ¶¶ 74-76; C-SoF ¶¶ 6-7);
- how much storage space to allocate to each subscriber (SoF ¶ 106; C-SoF ¶¶ 8-9);
- whether subscribers will be allowed to make impulse purchases of additional storage (C-SoF ¶¶ 8-9);
- the number of programs that may be recorded at any given time (SoF ¶¶ 133-136; FSoF ¶¶ 1-3); and
- whether recorded programs may be shared within a household (SoF ¶¶ 137-138).

Cablevision has made rules to resolve each of these issues for the current roll-out of the Service, and Cablevision retains the undisputed ability to change those rules. Cablevision asserts that its internal deliberations and the choices that it made a conscious decision to reject (in some instances in response to legal advice (SoF ¶¶ 136, 138)) are irrelevant (CV Mem. at 37-38), but the decision-making process is plainly pertinent. The alternative iterations of the Service demonstrate both Cablevision's active involvement in setting the rules for the infringing reproductions and transmissions *and* Cablevision's ongoing ability to change those rules.

The Cablevision Opposition analogizes the RS-DVR Service to the same three items that appear in its own motion for summary judgment: Sony's Betamax, set-top DVRs, and "self-service" copiers. For the reasons set forth in the Turner Opposition, each of these differs in crucial respects from the Service. (*See* Turner Opp. at 8-13.) Cablevision's Opposition does not address any of these crucial differences. Presented with a host of cases that have found infringement in more comparable circumstances (*see* Turner Mem. at 14), Cablevision attempts to distinguish these cases *en masse* with the argument that each of them turned on the involvement of the defendants' employees.[5] Although some of these cases took note of actions by defendants' employees (just as in describing the RS-DVR Service, one might note the actions of Cablevision's employees in licensing content from content providers, setting and changing the business rules for the Service and operating the Service), the nature of the actions by the employees was not the determinative basis of finding infringement. *See, e.g., Basic Books Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991); *Princeton Univ. Press v. Michigan Document Servs, Inc.*, 99 F.3d 1381 (6th Cir. 1996). There was of course the logical assumption that a copying service run by these companies conferred responsibility for any infringement on those companies. So too here. Cablevision asks this Court to make new law to excuse infringing businesses, regardless of their other actions, provided they use machines or robots that they have programmed in making the infringing reproductions and transmissions. This makes no logical sense — and if adopted, would wreak havoc on the exclusive rights of copyright-holders in today's digital world.

---

[4] In its Response to Turner's Statement of Facts, Cablevision asserts that the terms of the affiliation agreements — which expressly prohibit Cablevision's reproductions and transmissions in the RS-DVR Service — are "immaterial" because Plaintiffs have not brought a breach of contract claim. (Cablevision Response to Turner's Statement of Facts Pursuant to Local Rule 56.1 ¶¶ 30-37.) To the contrary, the affiliation agreements are highly material to Plaintiffs' copyright claims. Because of those agreements, it cannot be controverted that Cablevision's conduct here is unlicensed. Turner reserves its rights to assert contract claims if Cablevision ever launches the RS-DVR Service with unlicensed Turner programming.

The Cablevision Opposition also continues to rely on *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), and related cases (CV Opp. at 13-16, 18-19). The Turner Opposition and the Studios' Opposition set forth the myriad of reasons why these cases are legally and factually inapposite. (*See* Turner Opp. at 13-17; Studios' Opp. at 11-13.) In *Netcom* and the cases that followed, the defendants were legitimate ISP

[5] Notably, Cablevision acknowledges that *Elektra Records Co. v. Gem Electronic Distributors, Inc.*, 360 F. Supp. 821 (E.D.N.Y. 1973), cannot be distinguished on these grounds. Cablevision relegates *Elektra* to a footnote and states that it can be interpreted as a case of indirect liability. (CV Opp. at 12 n.4.) In fact, the court in *Elektra*, in finding the defendant business liable for infringement, did not discuss indirect liability. 360 F. Supp. at 823.

services that did not control content[6] and that, unlike Cablevision here, did *nothing* other than provide a conduit for the infringing conduct of others — a liability distinction recognized in the protections of the Digital Millennium Copyright Act, for which cable operators, like Cablevision, in providing television programming services, cannot qualify. (*See* Turner Opp. at 17-18.)

B. Cablevision's Buffer Copies Are Unauthorized Reproductions

Cablevision admits that it makes buffer copies of Plaintiffs' copyrighted programming. (CV Opp. at 31-32.)[7] Cablevision does not contend that these buffer copies have been authorized by the copyright-holders (unlike the authorized buffer copies sometimes made during routine computer usage). (*See* CV Opp. at 33; Turner Opp. at 7 n.4.) Cablevision acknowledges that two sets of these buffer copies are not associated with any individual subscriber request. (CV Opp. at 31-32.) Moreover, Cablevision acknowledges that "[a] copy made before — and without regard to whether — a consumer is involved in the copy process could *never* be copying *by* the consumer". (*Id.* at 11.) We agree. Notwithstanding these admissions, Cablevision argues that buffer copies cannot be infringing because they are supposedly (a) not "fixed" (*id.* at 32-34), and (b) *de minimis* (*id.* at 35). Each of these arguments is without merit.

First, the buffer copies are "fixed" according to the definitions in the Copyright Act. Section 101 defines "copies" as any material object in which a work is "fixed" and from which the work can be "reproduced . . . , either directly or with the aid of a machine or device". 17 U.S.C. § 101 (definition of "copies"). The definition of "fixed" sets forth the same standard, providing that a work is "fixed" if it can be "reproduced". 17 U.S.C. § 101 (definition of "fixed"). Cablevision

[6] Contrary to Cablevision's (unsupported) assertion (CV Opp. at 14), cases following *Netcom* have looked to an ISP's degree of control over content in determining whether the ISP has *direct* liability (not merely secondary liability), and the two post-*Netcom* cases most analogous to this one both found that ISPs had *direct* liability for exactly this reason. (*See* Turner Opp. at 15-16.)

[7] All of the buffer copies made by Cablevision in the RS-DVR Service are infringing. (Turner Mem. at 16-17.) Turner focuses on the clamper buffer copy and the primary ingestion buffer copy because they are not associated with individual subscriber requests and therefore belie Cablevision's claim that copies are made only in response to subscriber requests. (*Id.* at 16.)

admits that the primary ingestion buffer copies are themselves reproduced to create further copies. (CV Opp. at 35 (buffer copies are "consequential" in creation of permanent copies); SoF ¶ 98.) Whether the buffer copies persist for "one second" (CV Opp. at 33 n.16) or "ten [to] one hundred milliseconds" (*id.* at 33) is irrelevant, because unquestionably "reproduction" occurs from those copies.[8] Indeed, in today's digital environment many reproductions can be made in under a second. Congress provided a functional rather than a temporal definition of fixation: if a copy can be reproduced — and Cablevision concedes its buffer copies are reproduced — then it is fixed. *See Triad Sys. Corp. v. Se. Express Co.*, No. C 92 1539, 1994 WL 446049, at *5-*6 (N.D. Cal. Mar. 18, 1994), *aff'd in relevant part*, 64 F.3d 1330 (9th Cir. 1995).[9] As stated by the Copyright Office, "Unless a reproduction manifests itself so fleetingly that it cannot be copied . . ., the making of that copy should fall within the scope of the copyright owner's exclusive rights." U.S. Copyright Office, *DMCA Section 104 Report*, at 111 (Aug. 2001), *available at* http://www.copyright.gov/reports/. Without the unauthorized clamper and ingestion buffer copies, the RS-DVR Service would not work. *See id.* ("all [buffer copies] from which economic value can be derived" are reproductions subject to the exclusive reproduction right).

Second, Cablevision's argument that the buffer copies are *de minimis* is contradicted by the undisputed fact that the buffer copies comprise, in the aggregate, the entirety of each Plaintiffs' copyrighted works being infringed. (SoF ¶ 102.) In the cases cited by Cablevision (CV

---

[8] Although the number of bytes in the buffer at any one time is legally immaterial, it is worth noting that, even as Cablevision disputes Plaintiffs' factual allegations regarding the size of the primary ingestion buffer (CV Opp. at 33 & n.16), Cablevision does not inform the Court of the size of the clamper buffer, which in fact holds numerous frames of video (and associated audio content) at a given time. (FSoF ¶¶ 4-5.)

[9] Cablevision's suggestion that, because the buffer copies pass through Cablevision's computers, they are necessarily "transitory" (CV Opp. at 33) was expressly rejected in *Marobie-FL, Inc. v. National Association of Fire Equipment Distributors*, 983 F. Supp. 1167, 1177-78 (N.D. Ill. 1997), a case relied upon by Cablevision.

Opp. at 35), the alleged infringer copied only a small portion of the copyrighted work.[10] Here, Cablevision is copying each of Plaintiffs' copyrighted programs in its entirety. *See Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1335 (9th Cir. 1995); U.S. Copyright Office, *DMCA Section 104 Report*, at 133 (Aug. 2001) ("Even if each individual buffer copy were to be considered a *de minimis* portion . . . , the aggregate effect is the copying of the entire work.").

II. CABLEVISION IS ENGAGED IN UNAUTHORIZED TRANSMISSION

A. Cablevision Makes the Infringing Transmissions

Cablevision acknowledges that "Cablevision's *equipment* is used to 'transmit' recorded copies of programs from one place to another" (CV Opp. at 18). Cablevision does not contend — nor can it — that these transmissions are authorized by its licenses from Plaintiffs. (SoF ¶¶ 30-37.) Nevertheless, Cablevision seeks to evade responsibility by claiming that its role in those transmissions is "*merely* provid[ing] its customers a machine or system that indiscriminately transmits" (CV Opp. at 18 (emphasis added)). Contrary to Cablevision's contention that it does not determine "which recorded content will be available to be retrieved" (*id.* at 19), Cablevision *first* determines the universe of available content, by its unilateral decision of which linear networks to include in the RS-DVR Service (*see supra* pp. 2-3), and *second* sets business rules that determine which content will be available for a particular subscriber to view. (SoF ¶¶ 137-138.) And contrary to Cablevision's contention that it does not determine "which specific content will actually be retrieved by customers" (CV Opp. at 19), Cablevision maintains computers to track which recorded content it will allow each subscriber to view, so that when a subscriber requests to view content,

---

[10] *See Warner Bros. Inc. v. Am. Broad. Cos.*, 720 F.2d 231, 242 (2d Cir. 1983); *Knickerbocker Toy Co. v. Azark-Hamway Int'l, Inc.*, 668 F.2d 699, 703 (2d Cir. 1982); *Marks v. Leo Feist, Inc.*, 290 F. 959, 960 (2d Cir. 1923). The only other case cited by Cablevision in which a court found a use to be *de minimis* was *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1988). In that case, the alleged infringement was the "virtually unidentifiable" *display* of a copyrighted work. *Id.* at 218. Here, Plaintiffs allege that the buffer copies infringe on the reproduction right, not the display right.

Cablevision determines which "specific content" will be streamed from Cablevision's servers (over Cablevision's cable lines) to the subscriber. (*See* SoF ¶¶ 77-78, 81-84, 111-116.)

The Cablevision Opposition fails to distinguish Cablevision's RS-DVR Service transmissions from the VOD transmissions that Cablevision acknowledges must be licensed. (SoF ¶¶ 38-39.) Cablevision's discussion of VOD — which, notably, includes not a single citation to the factual record — consists of a series of statements that have nothing to do with *transmission*. (CV Opp. at 24-25.) Cablevision's purported distinctions are all based on the (disputed) notion that in the RS-DVR Service, unlike VOD, the subscriber copies and thereby originates the content. Cablevision offers no explanation of why its (contested) view that the subscriber makes the *copy* in the RS-DVR Service should determine the question of who makes the *transmission*. The transmissions are standalone infringements and would be actionable, even assuming *arguendo* that subscribers make the reproductions.

B. Cablevision's Transmissions Are Made "To the Public"

Cablevision's second defense to its infringing transmissions is that because Cablevision makes multiple copies of copyrighted programming, and Cablevision makes each copy available to only one subscriber, Cablevision does not transmit the programming to the public. (CV Opp. at 17, 26-20.) This position defies the Copyright Act, the case law and common sense.[11]

Section 101 of the Copyright Act provides that "*a work*" — not a copy — is publicly performed if it is transmitted *either* (1) "[to] a place open to the public", or (2) "*to the public*, . . . whether the members of the public capable of receiving the performance . . . receive it in the same

[11] Although Cablevision claims that this position is supported by "commentators" (CV Opp. at 26), it cites to only one commentator, who in turn cites to no cases or authority other than Section 101, the definitional section of the Copyright Act (*id.* at 23). The language on which Cablevision relies was added to the Nimmer treatise by David Nimmer, the present author, to explain his disagreement with *National Football League v. Primetime Joint Venture*, 211 F.3d 10 (2d Cir. 2000), which is controlling here and which supports Plaintiffs' reading of the "public performance" right. (*See* Studios' Opp. Mem. at 19-20.)

place or in separate places and at the same time or at different times". 17 U.S.C. § 101 (definition of "publicly") (emphasis added). Cablevision admits that its subscribers are "members of the public". (CV Opp. at 23.) That admission alone is sufficient to establish that each time Cablevision transmits "a work" to these individuals, it makes a transmission "*to the public*".

Cablevision offers no effective response to the series of cases cited by Plaintiffs (Turner Mem. at 18-19) holding that transmissions to even a single member of the public infringe on the exclusive right of public performance. Although in those cases the defendants used *one* copy of a work to make their transmissions "to the public" and in this case Cablevision intends to use *many* copies of the same work (CV Opp. at 26), Cablevision offers no explanation why this alleged distinction is or should be meaningful under the copyright laws. Section 101, which speaks of transmitting a "work", not a "copy", and common sense dictate that it should not be. (*See* Turner Opp. at 19). Cablevision argues that the commercial nature of its relationship with its subscribers could only be relevant to the first clause of Section 101's definition of "publicly" (the "public place" clause) and not the second clause (the "transmit" clause) (CV Opp. at 21), but the cases cited by Plaintiffs demonstrate that the commercial nature of the relationship is determinative under either meaning of "publicly". *See Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984) ("transmit" clause); *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 192 F. Supp. 2d 321, 332 (D.N.J. 2002) (same), *aff'd*, 342 F.3d 191 (3d Cir. 2003), *cert. denied*, 540 U.S. 1178 (2004); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991) (performance is public under the "transmit" clause "because the relationship between the transmitter . . . and the audience, hotel guests, is a commercial, 'public' one").

III. CABLEVISION'S UNAUTHORIZED DISTRIBUTION

Cablevision cannot have it both ways. If — as Plaintiffs contend — the copies on Cablevision's head-end servers are Cablevision's, then Cablevision violates Plaintiffs' public performance right when Cablevision transmits those programs to subscribers. If, on the other hand — as Cablevision contends — the copies on Cablevision's head-end servers belong to subscribers and not to Cablevision, then it is clear that Cablevision distributed those copies to its subscribers when it placed the content in the subscriber's allocated disk space at Cablevision's head-end. Cablevision fails to explain how the subscriber obtained the copy supposedly belonging to him or her if not by distribution from Cablevision.[12]

CONCLUSION

For all of the foregoing reasons, Turner respectfully requests that this Court grant its motion for summary judgment.

October 6, 2006

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP

By [signature]

Katherine B. Forrest (KF-1979)
Antony L. Ryan (AR-0394)

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Turner Plaintiffs, Counterclaim Defendants and Third-Party Defendants

[12] Cablevision suggests (but stops short of actually claiming) that the distribution argument is somehow untimely. (CV Opp. at 35-36.) But the distribution argument is based squarely on the facts alleged in the complaint (Compl. ¶¶ 1, 5, 20-24) and the undisputed factual record. Notice pleading requires no more. After Cablevision surfaced its novel theory that the copies on hard drives at Cablevision's head-end belong not to Cablevision but to subscribers, Plaintiffs promptly and specifically identified the distribution argument in their response to Cablevision's First Set of Interrogatories served on August 13, 2006, and in every brief in connection with the parties' cross summary judgment motions. In short, Cablevision has had a full opportunity to respond to the distribution argument.